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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIF.

BY:

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DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOSE A. BORJA,
CDCR #T-54311,

Plaintiff,

vs.

F. GONZALEZ; J. GONZALEZ;
M. ALVAREZ; C. NEAL;
DELEAT,

Defendants.

Civil No. 10-1379 BEN (WMC)

ORDER:

(1) GRANTING PLAINTIFF'S
MOTION TO PROCEED *IN*
FORMA PAUPERIS, IMPOSING
NO INITIAL PARTIAL FILING FEE
AND GARNISHING BALANCE
FROM PRISONER'S TRUST
ACCOUNT PURSUANT
TO 28 U.S.C. § 1915(a)
[Doc. No. 2];

AND

(2) DIRECTING U.S. MARSHAL TO
EFFECT SERVICE OF COMPLAINT
PURSUANT TO FED.R.CIV.P. 4(c)(3)
& 28 U.S.C. § 1915(d)

Jose A. Borja ("Plaintiff"), a state prisoner currently incarcerated at Kern Valley State Prison in Delano, California, and proceeding in pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff claims his Eighth Amendment rights were violated when he was stabbed multiple times while housed at Calipatria State Prison in 2007.

1 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead he
 2 has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc.
 3 No. 2].

I.

MOTION TO PROCEED IFP

4
 5
 6 All parties instituting any civil action, suit or proceeding in a district court of the United
 7 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
 8 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee
 9 only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
 10 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP
 11 remains obligated to pay the entire fee in installments, regardless of whether his action is
 12 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
 13 (9th Cir. 2002).

14 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a
 15 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account
 16 statement (or institutional equivalent) for the prisoner for the six-month period immediately
 17 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,
 18 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial
 19 payment of 20% of (a) the average monthly deposits in the account for the past six months, or
 20 (b) the average monthly balance in the account for the past six months, whichever is greater,
 21 unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
 22 institution having custody of the prisoner must collect subsequent payments, assessed at 20%
 23 of the preceding month’s income, in any month in which the prisoner’s account exceeds \$10, and
 24 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.
 25 § 1915(b)(2).

26 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
 27 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119.
 28 Plaintiff’s trust account statement shows he has insufficient funds with which to pay any initial

1 partial filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be
 2 prohibited from bringing a civil action or appealing a civil action or criminal judgment for the
 3 reason that the prisoner has no assets and no means by which to pay [an] initial partial filing
 4 fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve”
 5 preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack
 6 of funds available.”).

7 Therefore, the Court GRANTS Plaintiff’s Motion to Proceed IFP [Doc. No. 2], and
 8 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
 9 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court
 10 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

11 II.

12 SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

13 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 14 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused
 15 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 16 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
 17 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 18 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,
 19 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
 20 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
 21 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)
 22 (§ 1915A); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
 23 § 1915A).

24 “[W]hen determining whether a complaint states a claim, a court must accept as true all
 25 allegations of material fact and must construe those facts in the light most favorable to the
 26 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 27 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
 28 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police*

1 *Deptment*, 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.”
 2 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal
 3 interpretation to a pro se civil rights complaint, the court may not “supply essential elements of
 4 claims that were not initially pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266,
 5 268 (9th Cir. 1982). “Vague and conclusory allegations of official participation in civil rights
 6 violations are not sufficient to withstand a motion to dismiss.” *Id.*

7 As currently pleaded, the Court finds Plaintiff’s allegations sufficient to survive the sua
 8 sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). *See Lopez*, 203 F.3d at
 9 1126-27; *Farmer v. Brennan*, 511 U.S. 825 833-34 (1994) (“Prison officials have a duty ... to
 10 protect prisoners from violence.”). Accordingly, the Court finds Plaintiff is entitled to U.S.
 11 Marshal service on his behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court shall issue
 12 and serve all process, and perform all duties in [IFP] cases.”); FED. R. CIV. P. 4(c)(3) (“[T]he
 13 court may order that service be made by a United States marshal or deputy marshal ... if the
 14 plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”). Plaintiff is
 15 cautioned that “the sua sponte screening and dismissal procedure is cumulative of, and not a
 16 substitute for, any subsequent Rule 12[] motion that [a defendant] may choose to bring.” *Teahan*
 17 *v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

18 III.

19 CONCLUSION AND ORDER

20 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

21 1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No.
 22 2] is **GRANTED**.

23 2. The Secretary of the California Department of Corrections and Rehabilitation, or
 24 his designee, is ordered to collect from Plaintiff’s prison trust account the \$350 balance of the
 25 filing fee owed in this case by collecting monthly payments from the trust account in an amount
 26 equal to twenty percent (20%) of the preceding month’s income credited to the account and
 27 forward payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
 28 accordance with 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS SHALL BE CLEARLY**

1 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

2 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
3 Secretary, California Department of Corrections and Rehabilitation, P.O. Box 942883,
4 Sacramento, California, 94283-0001.

5 **IT IS FURTHER ORDERED** that:

6 4. The Clerk shall issue a summons as to Plaintiff's Complaint [Doc. No. 1] upon
7 Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each
8 Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy of this Order and
9 a certified copy of his Complaint and the summons so that he may serve Defendants. Upon
10 receipt of this "IFP Package," Plaintiff is directed to complete the Form 285s as completely and
11 accurately as possible, and to return them to the United States Marshal according to the
12 instructions provided by the Clerk in the letter accompanying his IFP package. Upon receipt,
13 the U.S. Marshal shall serve a copy of the Complaint and summons upon Defendants as directed
14 by Plaintiff on the USM Form 285s. All costs of service shall be advanced by the United States.
15 *See* 28 U.S.C. § 1915(d); FED. R. CIV. P. 4(c)(3).

16 5. Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint within the
17 time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42
18 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to "waive the right to
19 reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility
20 under section 1983," once the Court has conducted its sua sponte screening pursuant to 28
21 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based on
22 the face on the pleading alone that Plaintiff has a "reasonable opportunity to prevail on the
23 merits," the defendant is required to respond).

24 6. Plaintiff shall serve upon the Defendants or, if appearance has been entered by
25 counsel, upon Defendants' counsel, a copy of every further pleading or other document
26 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
27 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
28 of any document was served on Defendants, or counsel for Defendants, and the date of service.

1 Any paper received by the Court which has not been filed with the Clerk or which fails to
2 include a Certificate of Service will be disregarded

3
4 DATED

August 8, 2010

[Signature]

HON. ROGER T. BENITEZ
United States District Judge